MALAYSIA BRITISH ASSURANCE BHD.

v.

INSWAY SDN. BHD. & 2 ORS.

HIGH COURT, KUALA LUMPUR
DATO' HAJI ABDUL MALEK BIN HAJI AHMAD J.
[CIVIL SUIT NO. D5-22-1435-90]
8 MAY 1993

PRACTICE & PROCEDURE: Claim under a letter of indemnity - Application for summary judgment against third defendant - Whether there were triable issues - Whether consideration for the indemnity was past consideration - Subsequent agreement between the parties - Whether absolves the third defendant from liability.

The first defendant was appointed as the plaintiff's *del credere* agent in consideration of which the second and third defendants had signed a letter of indemnity in favour of the plaintiff. The first defendant breached the agency agreement and the plaintiff applied for summary judgment against the third defendant.

The third defendant contended that as the letter of indemnity had been signed more than three years aftere the letter of appointment, the letter of indemnity was invalid for lack of, or for past, consideration. The third defendant further contended that by an agreement between the plaintiff, the first defendant and the second defendant, she was no longer liable for the amount claimed.

Held:

[1] Where the consideration for the guarantee is forbearance to sue for past indebtedness or where the recital in a deed refers to past indebtedness, the guarantee will still be both prospective and retrospective in nature if future dealings are clearly included in the main body of the guarantee. The relevant letter of indemnity in this case, by the words it uses, clearly and conclusively provides for both prospective and retrospective default. In the circumstances, the issue of the lack of consideration is totally devoid of merit.

[2] The closing words of clause 16 of the agreement referred to by the third defendant categorically denote that although all previous arrangements, if any, made between the parties are cancelled, it does not prejudice any rights which had already been accrued to either party. The referred agreement does not absolve the third defendant from the claim now made by the plaintiff and as the plaintiff's claim continued to stand, the third defendant was liable in the circumstances.

[Plaintiff's application for summary judgment allowed with costs].

Cases referred to:

South East Asia Insurance Bhd. v. Nasir Ibrahim [1992] 2 MLJ 355 ***(cit)***

Squire v. Squire & Ors. [1972] 1 All ER 891 ***(refd)***

Other sources referred to:

The Modern Contract of Guarantee, James O'Donovan & John C. Phillips at pp. 150, 151

For the plaintiff - Suria Kumar; M/s. Chan & Kiru
For the third defendant - Y.Y. Chee; M/s. Sheikh Shatar-Cheah, Tan & Lee

JUDGMENT

Haji Abdul Malek Bin Haji Ahmad J:

By letter of appointment dated 9 December 1982, the plaintiff had appointed the first defendant as their *del credere* agent. In consideration of the said appointment, the second and the third defendants had signed a letter of indemnity on 10 March 1986 up to a limit of RM100,000. As the first defendant had breached the agency agreement, the plaintiff had sent the relevant letter of demand to the third defendant on 24 August 1990. On these facts, the plaintiff had on 25 June 1991 applied for summary judgment against the third defendant for the said amount, costs and other relief.

Learned Counsel for the plaintiff had reiterated that the amended statement of defence of the third defendant dated 31 December 1992 should be disregarded as it had been made without leave of the Court. The relevant amendments relate to the issues of set off and of the lack of consideration, the latter forming one of the two issues raised by learned Counsel for the third defendant in these proceedings to contest the plaintiff's application for summary judgment. As for the leave, it came as a surprise to me, after having decided on this matter, to discover that the same application had in fact been fully heard by the learned Senior Assistant Registrar, who had since been transferred, on 9 March 1992 and it was she who had ordered that both parties

amend their pleadings respectively before she could decide on the application. The plaintiff had done so on time but the third defendant had failed to do so within the stipulated period and had applied and obtained the extension of time to do so on 15 February 1993. It is odd that neither of the two Counsel had told me of the hearing before the learned Senior Assistant Registrar as they themselves had appeared before her a year earlier on the same application. It is stranger still for learned Counsel for the plaintiff to raise the issue of leave when he very well knew that it was the learned Senior Assistant Registrar who had ordered that the amendments be made. Under these circumstances, despite no decision being made by the learned Senior Assistant Registrar and despite it not being an appeal from her decision, I would consider this for all intents and purposes to be a rehearing in the real sense of the word and I would accordingly rule that no leave is necessary to amend the pleadings as it had been so ordered by the learned Senior Assistant Registrar.

On the question of set off, it should be pointed out that judgment in default had already been obtained against the first defendant on 19 December 1990 and that the first defendant's application to set aside the said judgment in default on the grounds that they were entitled to set off the amount claimed had been dismissed with costs on 22 January 1992. No appeal had been made against the said decision and it follows that the matter of set off, although raised in the amended statement of defence of the third defendant, is actually a non-issue especially so when learned Counsel for the third defendant had not actually raised it before me in his arguments.

As the letter of indemnity had been signed some three years and four months after the letter of appointment, learned Counsel for the third defendant had maintained that the letter of indemnity is invalid for lack of, or for past, consideration but this argument is completely demolished with learned Counsel for the plaintiff's referenc to **The Modern Contract of Guarantee** by James O'Donovan and John C. Phillips at pp. 150 and 151 which states:

> Is the guarantee prospective or retrospective? Most modern guarantees clearly indicate that the guarantee applies to debts that have already been incurred by the principal towards the creditor as well as those which will arise as a result of future transactions. A common form of wording is a guarantee to pay "on demand all moneys which are now or may from time to time hereafter be owing or remain unpaid". Provided that this substantive provision of the guarantee is clear, it is immaterial that there are other contrary indications in the recital to the guarantee or in the expressed consideration for the guarantee. Thus, where the consideration for the guarantee is forbearance to sue for past indebtedness or where the recital in a deed refers to past indebtedness, the guarantee will still be both prospective and retrospective in nature if future dealings are clearly included in the main body of the guarantee. Similarly, oral evidence will not be admitted to confine the guarantee to past indebtedness, when it is clearly worded so as to have both a retrospective and a prospective operation.

The relevant letter of indemnity here certainly, clearly and conclusively provides for both prospective and retrospective default by the words "We Hereby Jointly And Severally Undertake And Guarantee the payments due and other sums of money which may become payable by the Agent ...".

On this same issue of consideration, learned Counsel for the third defendant had also cited *South East Asia Insurance Bhd. v. Nasir Ibrahim* [1992] 2 MLJ 355 but I must emphasise that this authority is not really in their favour with the Supreme Court's finding in the penultimate paragraph of the judgment that:

> In deciding whether consideration is past, the Court should not take a strictly chronological view. If the consideration and the promise are substantially one transaction, as in this case, it should not matter in what order they are given. In other words, consideration itself accommodates past consideration so long as the 'desire' requirement is specified, that is the guarantee was given at the request of the indemnifier. As it can be proved that there was consideration, it can also be proved that the third party indemnity was valid.

Based on these two textbooks and case authorities, it was my opinion that the issue of the lack of consideration is totally devoid of merit.

The other issue raised by learned Counsel for the third defendant was the third defendant's reference to an agreement dated 18 July 1989 between the plaintiff, the first defendant and the second defendant to suggest that the third defendant was no longer liable for the amount

claimed but unfortunately for her the only reference to her in that agreement appears to be only at clause 16 which reads:

> 16. Save and except the agreement dated 27 May 1987 entered into between the parties hereto and the supplementary agreement dated 15 August 1987 entered into between the parties hereto and Chan Ka Mooi (F) (NRIC No. 4989835) all previous arrangements if any made between the parties hereto are hereby cancelled but without prejudice to any rights which have already accrued thereunder to either party.

The closing words categorically denote that although all previous arrangements if any made between the parties are cancelled, it does not prejudice any rights which had already been accrued to either party. For what it is worth, the referred agreement certainly does not absolve the third defendant from the claim now made by the plaintiff and despite it being annexed to one of the third defendant's affidavits, learned Counsel for the third defendant was himself not in a position to explain its inclusion or purpose while making his submissions. Consequently, I had to hold that the plaintiff's claim against the third defendant continued to stand and that the third defendant was liable in the circumstances.

All things considered, my view was that there were really no issues for trial. Accordingly, I had given the plaintiff the order in terms of their application.

PEMBINAAN MASDAMAI SDN. BHD.

v.

ME-WONG BUILDERS SDN. BHD.

HIGH COURT, MIRI
TUAN RICHARD MALANJUM J.
[ORIGINATING SUMMONS NO. MR 31 OF 1993]
8 FEBRUARY 1994

LAND LAW: Caveat - Plaintiff seeking removal of caveat - Plaintiff donee of power of attorney from registered proprietor in respect of parent title - Sub-division of parent title - Power of attorney endorsed on sub-divided issue document of title - Effect of endorsement - Whether endorsement was act of Registrar of Land Titles - Whether Registrar of Land Titles had power to so act - Whether a power of attorney would give an interest in land - Consideration of ss. 25, 45(3), 173(a), 177(1), 179, 189 of the Sarawak Land Code - Section 202 of the National Land Code - Land (Control of Subdivision) Ordinance.

PRACTICE & PROCEDURE: Application for removal of caveat - Claim for damages - Whether a power of attorney gave plaintiff the locus standi to commence this action.

The case before the Court was an application to remove a caveat registered at the Bintulu Land Registry Office affecting several parcels of land and for damages. The plaintiff secured an irrevocable power of attorney (the power of attorney) from the registered proprietor in respect of the parent title which was duly registered on 18 October 1983. Sub-division of the parent title was obtained and the sub-divided issue documents of title (IDT) contained *inter alia* an endorsement of the existence of the power of attorney.

The plaintiff submitted that the power of attorney should be considered as duly registered in relation to the IDT as it had been endorsed thereto. The defendant on the other hand contended that the plaintiff had no *locus standi* to commence this action as it was not within the category of persons specified under s. 177(1) of the Sarawak Land Code (Cap 81) (the Code). Furthermore, that the endorsement of the power of attorney was of no consequence because s. 189 of the Code had not been complied with and the power of attorney did not create any interest in the land as it was extinguished upon surrender of the parent title. Learned Counsel for the plaintiff conceded that a power of attorney